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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re MANUEL S.,

a Person Coming Under the Juvenile  
Court Law.

B193644

(Los Angeles County  
Super. Ct. No. YJ29220)

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL S.,

Defendant and Appellant.

APPEAL from an order the Superior Court of Los Angeles County, Irma J. Brown, Judge. Affirmed.

Jolene Larimore, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Appellant Manuel S., a minor, appeals from an order of the juvenile court declaring him to be a ward of the court (Welf. & Inst. Code, § 602) and ordering camp placement.

On July 14, 2006, a juvenile petition was filed charging appellant in count I with a violation of Penal Code section 245, subdivision (a)(1),<sup>1</sup> assault by means of force likely to produce great bodily injury on Avery Martin (Martin). In count II, appellant was charged with a violation of section 422, subdivision (a)(1), making a criminal threat against Martin. A gang enhancement (§ 186.22, subd. (b)(1)(B))<sup>2</sup> was alleged as to both counts. In count III, appellant was charged with resisting an executive officer in violation of section 69.

On July 17, 2006, a second petition was filed charging appellant with a violation of section 242, misdemeanor battery on Gabriel Becerrada (count I) and on Shawn Becerrada (count II). A gang enhancement was also alleged as to both battery offenses. (§ 186.22, subd. (b)) The gang enhancements in this petition were ultimately dismissed on the prosecution's motion.

As to the first petition, on August 3, 2006, the court granted the prosecution's motion to dismiss count II. After a contested hearing, the court sustained the remaining counts and found the gang allegation true. As to the second petition, appellant admitted count I, and count II was dismissed.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> During the proceedings, the gang enhancement was amended to section 186.22, subdivision (b)(1)(A), which would provide for an additional punishment of two, three, or four years at the court's discretion as opposed to section 186.22, subdivision (b)(1)(B), which deals with serious felonies and adds an additional term of five years.

On appeal, appellant contends that the juvenile court erred in denying his motion for dismissal of the gang enhancement following the prosecution's case and allowing the prosecution to reopen to prove the gang enhancement. We disagree and affirm the judgment.

### **FACTS<sup>3</sup>**

During the late afternoon on July 12, 2006, 19-year-old Martin was hit and kicked numerous times by appellant, Levy R., Johnny J., Christian S.<sup>4</sup> and Benny Moreno (Benny) outside a Tommy Burger restaurant in Santa Monica. Martin's grandfather, Murray Fields (Fields), intervened and tried to stop the attack. As a result of Fields' intervention, Martin was able to get up and run. Martin was chased by Levy and Johnny, who threatened to kill him. Martin thought he saw Johnny pull a gun and point it at him. Martin escaped.

Martin's girlfriend, who witnessed the incident, identified appellant, Christian, and Levy in court as being three of Martin's attackers.

Santa Monica Police Sergeant Joaquin Vega responded to the scene and detained appellant and Benny as they tried to flee. During the arrest, Benny struggled as he was handcuffed. Appellant lunged at one of the officers and was subdued with pepper spray.

Santa Monica Police Officer Frank Marnell, assigned to the gang detail, opined that Johnny, Christian, Levy and appellant were affiliated with the Santa Monica 17 Street gang. Tommy's restaurant was within the gang territory. Officer Marnell testified that for a long period of time, the gang had many "run-ins" with Martin based on their belief that he was a member of a rival gang in the area, the Graveyard Crip gang. Martin's girlfriend had a brother who was an associate of the Graveyard Crip gang.

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<sup>3</sup> Inasmuch as appellant raises no issues with respect to the second petition, we discuss only those facts on which the first petition was based.

<sup>4</sup> Levy R., Johnny J. and Christian S. were tried jointly with appellant but are not parties to this appeal.

Officer Marnell had contacts with members of the Santa Monica 17 Street gang relating to numerous felonies.

After the prosecution was allowed to reopen its case, over the objection of appellant, Officer Marnell testified regarding a robbery conviction and an assault with a deadly weapon conviction of Santa Monica 17 Street gang members. Certified court records were introduced to support the officer's testimony.

## DISCUSSION

Appellant contends that the juvenile court erred in denying his motion for dismissal of the gang enhancement following the prosecution's case. We disagree.

To subject a defendant to the consequences of section 186.22, "the prosecution must prove that the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' (§ 186.22, subd. (b)(1) . . . .) In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. (§ 186.22, subds. (e) and (f).)" (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617, italics omitted.)

At the close of the prosecution's case, appellant made a motion pursuant to Welfare and Institutions Code section 701.1<sup>5</sup> to dismiss the gang allegation based on the

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<sup>5</sup> Welfare and Institutions Code section 701.1 provides as follows: "At the hearing, the court, on motion of the minor or on its own motion, shall order that the petition be

prosecution's failure to prove the requisite predicate acts. The juvenile court denied the motion, believing such proof unnecessary. Thereafter, the prosecution moved to reopen its case to prove predicate acts. The court initially denied the motion. During closing arguments, however, over appellant's objection and upon reconsideration of the applicable law, the court allowed the prosecution to reopen in an effort to prove the section 186.22 allegation.

Appellant contends that the juvenile court abused its discretion in allowing the prosecution to reopen the case. Appellant argues that since review of an unsuccessful motion for acquittal is limited to the evidence introduced at the time the motion was made (*People v. Trevino* (1985) 39 Cal.3d 667, 695, overruled on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194),<sup>6</sup> the prosecution cannot thereafter introduce additional evidence to defeat the motion. The record here indicates that there was not sufficient evidence to sustain the section 186.22 allegation at the close of the People's case, when appellant made his dismissal motion.

The People respond that the juvenile court did not abuse its discretion in allowing the People to reopen the case to prove the section 186.22 allegation. They rely on the case of *People v. Ceja* (1988) 205 Cal.App.3d 1296 to support their position that the court has the discretion to allow the prosecution to reopen after an acquittal motion has been made, so long as the court is convinced that failure to present evidence on a particular issue was the result of "inadvertence or mistake on the part of the prosecutor

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dismissed and that the minor be discharged from any detention or restriction therefore order, after the presentation of evidence on behalf of the petitioner has been closed, if the court, upon weighing the evidence then before it, finds that the minor is not a person described by Section 601 or 602. If such a motion at the close of evidence offered by the petition is not granted, the minor may offer evidence without first having reserved that right."

<sup>6</sup> The rules and procedures applicable to a motion for acquittal under section 1118 in adult proceedings also apply to a dismissal motion under Welfare and Institutions Code section 701.1 in juvenile proceedings, in that the two statutes contain similar provisions. (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 727.)

and not from an attempt to gain a tactical advantage over [the defendant].” (*Id.* at p. 1304.)

The record here shows that, in opposing appellant’s motion to dismiss, the prosecutor took the position that section 186.22 did not require proof of predicate acts, a position with which the juvenile court agreed. On the next day of the proceedings, the prosecutor, indicating that there was an ambiguity as to section 186.22 and out of an abundance of caution, sought to reopen to present evidence as to the predicate acts. The court denied the motion at that time. At the conclusion of closing argument, the court indicated that it had reread the statute and case authority and believed that proof of predicate acts was required. At that point, it allowed the prosecution to reopen to present evidence of two predicate acts by Santa Monica 17 Street gang members. It is clear that the prosecution was not playing “hide the ball” or attempting to gain a tactical advantage over appellant. The reopening was allowed after the juvenile court reconsidered its prior ruling. Additionally, there was no showing that the new evidence would prejudice a jury since juvenile proceedings involve court trials. This supports a finding that there was no abuse of discretion in allowing reopening of the case. (*People v. Ceja, supra*, 205 Cal.App.3d at p. 1304.)

*People v. Rodriguez* (1984) 152 Cal.App.3d 289 illustrates circumstances justifying an exercise of discretion to permit the prosecution to reopen a case. In *Rodriguez*, which involved a court trial, the trial court found the defendant guilty, took the issue of the priors under submission, and at sentencing allowed the prosecution to reopen the case and submit certified records to prove the priors. (*Id.* at pp. 292-293.) The appellate court upheld the trial court’s decision to permit the reopening, indicating proof of the priors had been an issue in the case since filing the information, and the presence of a bench trial eliminated any possibility of prejudicing a jury. (*Id.* at p. 295.)

In the instant case, appellant had been on notice of the section 186.22 allegation since the juvenile petition was filed, there was a court trial, and there was no prejudice to appellant by allowing the prosecution to reopen, because the juvenile court was willing to allow appellant to contest the new evidence with his own evidence. Clearly, the juvenile

court did not abuse its discretion in allowing the prosecution to reopen its case. (*People v. Rodriguez, supra*, 152 Cal.App.3d at p. 295.)

Appellant, citing *People v. Norris* (2002) 95 Cal.App.4th 475, suggests that *People v. Ceja, supra*, 205 Cal.App.3d 1296, *People v. Rodriguez, supra*, 152 Cal.App.3d 289 are inapplicable here, in that they involved prior conviction allegations. *Norris* held that the plain language of section 1118 renders it inapplicable to recidivist allegations such as prison priors (*Norris, supra*, at p. 479) but expressed no opinion as to whether section 1118 applied to conduct-based enhancements (*id.* at p. 480), which would include the gang enhancement at issue here. *Norris*, however, dealt with the question whether a trial court could change its ruling after *granting* a section 1118 motion. (*Id.* at p. 478.) Section 1118.2 bars further prosecution once an acquittal has been entered pursuant to section 1118. (*Ibid.*) Additionally, with respect to substantive offenses, double jeopardy considerations may arise following acquittal under section 1118. (*Id.* at pp. 479-480.) Nothing in *Norris* suggests that a trial court cannot allow the prosecution to reopen its case, as to either a substantive offense or an enhancement, after a section 1118 motion has been *denied*.

## DISPOSITION

The order is affirmed.

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JACKSON, J.<sup>\*</sup>

We concur:

MALLANO, Acting P. J.

VOGEL, J.

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Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.